IN THE SUPREME COURT OF FLORIDA

CASE NO: 76,829

TOMMY RICHARDSON

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

This is an appeal by a Defendant/Appellant, **TOMMY RICHARDSON**, of a conviction for first degree murder and a corresponding sentence of death imposed by Judge Robert L. McCrary of the 14th Judicial Circuit Court, in and for, Jackson County, Florida.

Throughout this brief, Mr. Richardson will be referred to as "the defendant". The Appellee, **the STATE OF FLORIDA**, will be termed "the State." Reference to the Record on Appeal, Supplement thereto and Transcript of proceedings will be made by the use of the symbols "R," "S," and "T" respectively, followed by citation to the appropriate page.

The State disputes the defendant's Statement of the Case and Statement of the Facts and thus includes its own hereinafter.

STATEMENT OF THE CASE

The defendant was indicted for the first degree murder of Irene Newton which occurred on 31 December 1989 in Campbellton, Florida.(R.1-2). Thirteen days later, Captain Claude Widner and Lt. Larry Birge of the Jackson County Sheriff's Office took a voluntarily made tape-recorded statement from the defendant who had been hospitalized in Dothan, Alabama as a result of self-inflicted injuries incurred at the time of the shooting.(S.1-35).

A warrant for the defendant's arrest was issued and was served upon the defendant at his half-sister's home in Dothan, Alabama on 18 January 1990.(R.3-4,5-6). The defendant waived extradition and was returned to Jackson County several hours later in the custody of Deputy Walter Davis, who he knew casually.(R.10;T.289). During the return trip, the defendant began discussing his feelings for the victim, prompting Deputy Davis to repeatedly inform the defendant that he knew he was a law enforcement officer and that if he persisted in talking he would be obliged to read the defendant his Miranda rights.(T.291-4). Deputy Davis read the defendant his rights when the defendant ignored these warnings; the defendant proceeded to make incriminating statements relating to the murder.(T.294-6,303-5). Both of the statements made by the defendant were found to have been freely and voluntarily made by the trial court at a hearing on the defendant's motion to suppress.(R.67-8;T.278,314).

On 21 September 1990, the defendant moved the trial court for a continuance to allow him to obtain appointment of a firearms expert to rebut the findings of F.D.L.E. firearms

examiner David Williams which had not been available, in their completed written form, to either party prior to the 19th.(R.93-95). These findings, with the exception of those relating to one spent shell, were exactly what had been anticipated by counsel[1].(T.329). The defense argued that it would be prejudiced by having to prepare this aspect of the case over the weekend and added that "it might be worthwhile to have an expert double check the work that the F.D.L.E. man has done."(T.328). After hearing argument, the trial court denied the motion ruling that the defense would not be damaged by proceeding to trial.(T.332).

The defendant was found guilty as charged and the jury, after hearing penalty phase testimony, recommended, by a vote of 11 to 1, that the defendant be sentenced to die in the electric chair.(R.131,145-6;T.722,757). The trial court, on 15 October 1990, imposed the death penalty, finding that the murder was especially heinous, atrocious, and cruel and was also committed in a cold, calculated and premeditated manner without any pretense of legal or moral justification.(R.170-8;T.773-9). In mitigation, the court found that the defendant had no significant history of prior criminal activity, that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, and that the defendant was sincerely

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[1] Williams had, prior to the 19th, been in telephone communication with counsel regarding his findings.(T.328). Following his intial examination of the spent casings, Williams was unable to determine if the rusty casing had been fired from the defendant's gun.(T.328-30). After additional testing he was able to state that it, like the other spent casing, came from the defendant's gun.(T.328-30).

remorseful as evidenced by his own suicide attempt following the murder.(R.175-6;T.776-7).

STATEMENT OF THE FACTS

The victim's daughter, Valerie Newton, explained that her mother had put the defendant, who had been living with them for between two to four years, out of her trailer shortly after Christmas because he had not been helping out financially and had been staying out late; she was tired of all the arguments in front of her children.(T.207,492). He had returned several times causing them to call the police who were unable to do anything since he would leave before they arrived disappearing into the woods behind the trailer.(T.207,506). The night before the shooting, he came to the trailer knocking on the door saying that he loved Irene and wanted to talk to her.(T.207,504). Irene refused to talk to him and asked him to leave them alone.(T.208,504). Valerie testified that the defendant scared them when he broke in through the back door, entered the trailer, and stood over her mother who was lying in a chair.(T.208-9,506-7). When Irene told the children to go and call the police, the defendant exited by the front door going into the woods until the police left.(T.209,216,505,507). He returned after they left threatening Irene and telling her "I heard every word you said. I'm going to kill you. I'm going to kill you."(T.216-17,505). They boarded up the back door with wire in an attempt to kept the defendant out.(T.209).

On the night of the murder, New Years Eve, 1989, the family[2] was at the trailer preparing to go to a party when the defendant

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[2] The family included Irene Newton, the vicitm, her children Everette, Bernard/Corey, Ronica, Lamont, Terrence and the witness.(T.202). Irene's sister, Huberta Chapman also resided at

knocked on the door.(T.201-3,493). Huberta told the defendant to go away and leave them alone, but he replied that he wanted to talk to Irene, that he loved her.(T.203,494-5). Irene asked the defendant what he wanted and he said that he just wanted to talk to her, so she cracked the front door.(T.203,495). The defendant "busted open" the door, pulled out his pocket knife which he began waiving around, and walked around the trailer.(T.203,495-7). Irene followed, with Valerie behind her; Valerie testified that she, not her mother took a knife, to protect them from the defendant.(T.203,497,508). Valerie believed, but was not sure, that Everette and Reno also went outside.(T.204,498).

The defendant was angry and both looked and acted crazy.(T.204,511). When he reached the side of the trailer, he retrieved a shotgun that was by the tongue[3], and shot her mother who fell to the ground.(T.205,213,498-500). Valerie saw him pull the trigger while standing two to three feet away from Irene who was facing him.(T.213,499,511). The defendant then pointed the gun at her while standing over her mother so she ran to a next door neighbor's home since they did not have a phone at the trailer.(T.206,214,498,501). Valerie had never seen the shotgun before.(T.499). The defendant did not have the knife in his hand when he fired; she did not know what happened to it.(T.511-12). She did not see anything else, as she did not return to where her

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the trailer.(T.202). Also present was Valerie's cousin, Reno Knox, who had spent the last two days with them.(T.202).

[3] The shotgun was not visible until she reached the tongue of the trailer.(T.499,503).

mother was lying.(T. 206-7). Valerie testified that the defendant intended to shoot her mother; it was not an accident.(T.215).

Corey Bernard Newton testified that before the murder the defendant would bother them by coming to the trailer insisting upon talking to Irene; when she refused and called the police, he would disappear into the woods.(T.219,522-3). After the police would leave, he would return, calling her all kinds of names.(T.219,517,522-3). The night before the murder, the defendant had broken into the trailer causing them to call the police and wire up the back door to keep him out.(T.219-20,517-18). The defendant came back after the police left and told Irene "I heard everything. I heard everything you said. I'm going to kill you for that."(T.517,523). Corey was scared by the defendant's threats .(T.223).

The evening of the shooting, the defendant returned, knocking on the door and asking Irene, who was preparing to go to a community fish-fry, to come out and talk.(T.220,517). When she said no and tried to close the door, the defendant slammed the door open.(T.220,519). Irene went outside, followed by Valerie and Corey.(T.220,519-20). Each time Irene moved, the defendant moved further towards the back of the trailer.(T.221,519). The next thing Corey knew, the defendant had a gun; he heard the defendant say "What did you say?" before he shot his mother.(T.221). He saw his mother cry out holding her chest, then take two steps before falling.(T.521). Corey did not see the defendant, who was half in shadow, pull the trigger, but did see him holding the gun and also saw the flash as it

fired.(T.224,520). Corey testified that he had never seen the gun before because the defendant had not kept it at the trailer during the time he lived with them.(T.221). He described the defendant as looking and acting mean and crazy.(T.528).

Reno Knox, the victim's nephew, had spent the night before and the night of the shooting with his aunt's family.(T.226,231,532-3). The prior evening the defendant had come insisting on talking to Irene; when she refused, he broke into the trailer hiding in the woods when the police came.(T.227-8,543-4). After the police left, the defendant returned saying "I heard everything you said when I left. I'm going to kill you. I'm going to kill you."(T.227,545). Reno and Everette wired up the back door the defendant entered in an effort to keep him out.(T.227-8,544).

The night of the murder, the defendant came to the door and told Irene he wanted to speak with her alone; Irene opened the door and told the defendant to leave them alone.(T.228,534-5). Everette snuck out the window of his room to go to call for help.(T.537,545-6). The defendant snatched the door open and Irene went outside.(T.228,535). The defendant pulled a knife as Irene came outside; Irene moved towards him saying that she wasn't going to let him stab any of her kids.(T.228,535-6). Reno went around the back of the trailer to see if the defendant, who was walking around the trailer, would go into the woods so that this time the police could follow.(T.228-9,536-7). He saw the defendant holding a gun; the defendant put it to his shoulder and fired.(T.229,230,234,538). Reno ran to get Everette at his

uncle's and told him his mother had been shot; they both ran back and saw Irene lying on the ground.(T.228-30,539). The defendant was standing over her with his gun.(T.539). Everette turned her over saying "Momma, Momma, you all right?"(T.540). Irene did not reply, so he told Everette to come to the neighbor's to wait for the police since the defendant was still standing there with the gun.(T.539-40).

Deputy Gerald Whitehead testified that on 31 December 1989 he was the night shift supervisor for the Campbellton area.(T.469). He was dispatched to the Newton residence at approximately 7:59 p.m. reference a shooting.(T.470). Prior to the dispatch, he spoke with Deputy K.C. Gregg who indicated the Newton family was having ongoing problems the defendant and who advised he should attempt to contact the defendant to try to resolve the situation.(T.472).

A number of people were standing by the road at a brick house to the south of the Newton home when Whitehead arrived; he was warned not to go to the trailer alone since a woman had been shot and a second shot had been fired immediately prior to his arrival.(T.474). Ronica Newton ran up to the Deputy saying "he shot my Momma"; she also told him the defendant was armed and added that a second shot had just been fired.(T.474). Whitehead could not see anything and waited for Sgt. Davis to arrive as backup.(t.475). When Davis got there, he drove into the area slowly, with Whitehead on foot using the car as a shield.(T.475). As they turned into the drive, they saw two people lying on the ground; Davis identified the second person, who was still alive,

as the defendant.(T.476). The other body, lying next to the first, was that of a black female who had sustained a shotgun wound to the chest.(T.477). Deputy Whitehead spoke to the children, who showed great trauma, and to other witnesses on the scene.(T.478). He also located the shotgun, lying next to the defendant, and a knife which was found nearby.(T.477,483).

Sheriff Kenneth Bryan of the Houston, Alabama Sheriff's Department, assisted in the investigation by obtaining shell wadding from the defendant's wound and clothing worn by the defendant which was turned over to him by hospital personnel in Dothan, Alabama.(T.553-5). He in turn conveyed the evidence to Deputy Joey Rabon, of the Jackson County Sheriff's Department in a sealed package.(T.556-7). Deputy Rabon then gave the items to Captain Claude Widner, the lead investigator in the case.(T.557).

Captain Claude Widner testified that he was dispatched to the murder scene at 8:40 p.m. by which time the defendant had already been removed to the hospital.(T.558). Captain Widner had the opportunity to observe the victim's body, prepare a crime scene sketch, and take measurements and photos.(T.559). He also collected evidence consisting of: a .12 gauge Remington Model 1100 shotgun, a Barlowe pocket knife, a .12 gauge shotgun shell from inside the shotgun, a .12 gauge black shotgun shell, and a .12 gauge red (rusty) shotgun shell.(T.559). He noted that the area was illuminated by a bare lightbulb at the trailer door and two nearby street lights.(T.568-9). He received other evidence from Deputy Joey Rabon and from the Medical Examiner who conducted the autopsy of Irene Newton.(T.571-2,604-5). All of the evidence was forwarded to the crime lab for analysis.(T.572,574).

Captain Widner also testified, at the hearing on the defendant's motion to suppress, that on 12 January 1990, he and Lt. Larry Birge, went to the Southeast Medical Center in Dothan, Alabama, where the defendant was hospitalized, and obtained from him a voluntarily made tape-recorded statement.(T.259-60). Prior to questioning, Lt. Birge spoke to a nurse about the possibility of conducting an interview.(T.261). Upon entering the defendant's room, they inquired if he was willing to speak to them; a visitor, the defendant's brother, who had been there conversing with him for well over an hour, left.(T.262,274). The defendant agreed to speak with the officers.(T.262). His speech was clear and he had his faculties about him; he knew who they were and why they were there.(T.263). The officers told him that they were there to investigate the death of Irene Newton and advised the defendant of his Constitutional rights pursuant to Miranda.(T.263). At no time did the defendant request an attorney, ask them to leave, or complain of pain or discomfort.[4](T.264,267). He was not promised anything in return for making the statement nor was he threatened.(T.268-9).

The defendant told the officers that he had been living with Irene, in her home, for six years and that they had had some good years together.(T.S.3). They did not have any children together, but he conceded that he had five children by his first wife who moved away to an unknown place.(S.4). The defendant claimed that

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[4] Although at one point the defendant responded that he was "feeling pretty bad now," Captain Widner did not know if this referred to his physical condition or the fact that he felt badly about what had occurred, i.e., Irene's murder.(T.269).

he believed the child support for his children was paid up, stating that his employer, Danny Pelham, took money out of his check for them.(S.4).

The night of the shooting, the defendant asserted that Irene and her entire family had been drinking; he denied he had anything to drink.(S.7-8). He denied permenently leaving the premises since he did not take all his clothes with him and because Irene had not definitely told him to leave.(S.8). He claimed that the shotgun was at the trailer prior to the murder.(S.10). He stated that he had been away all day looking for work and that on his return he sat in the rain crying because he didn't know what was going on with his relationship with Irene.(S.8-9). The defendant stated that he did not know why Irene had put him out in the rain that evening; she was not upset or crying.(S.10).

When he arrived at the trailer, he knocked on the door, but Irene would not answer.(S.11). Her sister, Huretta[5], answered and asked him what he wanted.(S.13). When he told her he wanted to speak with Irene, she told him that Irene wasn't there.(S.13). He knew she was lying because he had heard Irene's voice when he got there and because he stopped at Irene's brother's place on the way to ask if she was home.(S.13). When he repeated he wanted to speak with Irene, she finally came and asked him what he wanted.(S.14). When he told her he still lived there too and that it was raining and he had no where to go, she told him to go away

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[5] The defendant, despite a claimed six year relationship with Irne and her family, did not know the correct names or ages of Irene's children. Here he apparently means Huberta.

and find some other place to stay.(S.14). The defendant claimed when he asked her what was wrong, that they hadn't had a fight that night, she told him to go away and leave her alone.(S.14). He went to the back of the trailer before returning to the door and asking to get his things.(S.15). The defendant claimed that Irene opened the door and was angry.(S.15). When he asked her why she was all dressed up, she told him she was going out and began cursing.(S.15). He told her he just wanted to talk to her and she replied she had nothing to say to him.(S.15). He stated that while he stood picking up his things which were being thrown out the door, Irene ran back into the house and returned with a knife.(S.15). Irene's girls started coming at him with a knife while her son, Eric, had their grandmother's shotgun.(S.15-16). He was "tusseling" with Irene when the back end of the gun hit the trailer tongue and went off shooting her.(S.16). He then slipped causing the gun to fire hitting him; however, he also stated he was not sure if the shot came from his gun or the other one.(S.17). He denied carrying a pocket knife but admitted he had a Barlowe knife; he denied taking it out of his pocket.(S.20). The defendant also stated that at the time Irene was shot, he had two bags with his clothes in his hands and was leaving the driveway.(S.23,27). He denied ever pointing the gun at her, claiming he was holding the gun with the butt to the ground and shaking it when it went off.(S.33). He also stated that he then threw the gun to the ground causing it to accidentally discharge; he denied intending to kill himself.(S.33-5).

Sgt. Walter Davis was off duty at the time he was advised of the shooting.(T.580). He was familiar with the defendant and also knew the victim.(T.580). Upon his arrival at the scene, Davis testified that he could see a body in the driveway of the trailer.(T.581). He had received information that the defendant was in the woods, but when he shone his flashlight around, he saw the defendant lying there as well.(T.581). Deputy Whitehead, was already on the scene; the defendant had been transported to the hospital.(T.582). Sgt. Davis located the defendant's shotgun, putting on the safety to prevent it from being fired.(T.583).

Sgt. Davis, along with two Houston County, Alabama, sheriffs, also served the warrant for the defendant's arrest upon him at his sister's home in Dothan, Alabama on 18 January 1990.(T.280-1,584,591). Davis was in uniform and was driving a marked patrol unit; Alabama Detective Eddie Ingram was in plain clothes and driving an unmarked car whereas a second officer was also in uniform and was driving a marked unit.(T.282). All three went, in their own vehicles, to the home of Estelle Snell; Davis knew Snell casually from before.(T. 283). Upon their arrival, several of the defendant's nephews and nieces were outside on the porch; they asked one girl if Estelle was home and she called her mother to the door.(T.284-5). Estelle stood in the doorway and after recognizing Sgt. Davis by name, invited them in.(T.285). They did not enter until invited to do so.(T.285). Detective Ingram told Estelle they were there because they had a warrant for the defendant's arrest.(T.286). She told them that he was sitting on the couch in the other room watching t.v.(T.286). They

walked into the room and Ingram explained why they were there before reading the defendant his rights.(T.287). The defendant was brought to the Houston County Courthouse to have the paperwork prepared for his extradition to Florida.(T.288).

At approximately 6:30 P.M. the paperwork was completed, the defendant having waived extradition, and Sgt. Davis brought him the patrol car for transport back to Jackson County.(T.288-90). On the way to the car, the defendant began telling Sgt. Davis that he loved Irene.(T.291,592). Sgt. Davis repeatedly reminded the defendant that he was a law enforcement officer.(T.291,592). The defendant continued to talk despite the warnings, so Sgt. Davis told him that if he insisted upon talking, he would have to read him his rights.(T.292,592). The defendant persisted in talking, so Sgt. Davis stopped at a light and proceeded to Mirandize the defendant.(T.292-3,592-3).

Sgt. Davis asked the defendant what happened and the defendant told him that they had been fusssing.(T.294). Davis asked him how he got to the house and the defendant told him that he had walked there from the State line with the shotgun concealed under his coat.(T.294,596). The defendant originally claimed that the gun belonged to his grandmother; however, when Sgt. Davis expressed his disbelief, the defendant changed his story claiming he had gotten the shotgun from some fellow in Graceville whose name he did not recall.(T.294,596). The defendant said he got Irene out of the trailer on the pretext of wanting to talk to her.(T.295,597). The shotgun was leaning up against the trailer.(T.597). The defendant told Davis they got to

fussing and he shot Irene from approximately two to three feet away.(T.597,599). Sgt. Davis then asked the defendant how he had gotten shot and he said that the gun had accidentally discharged when he threw it down while standing near the trailer tongue.(T.599). The defendant was not threatened or promised anything in return for the statement he insisted upon making.(T.290,595). He at no time during the return trip complained of discomfort; he made the trip sitting in the right rear seat of the patrol car.(T.300).

F.D.L.E. firearms examiner David Williams testified that he received evidence sealed in closed packages relating to this case which he then tested.(T.611-12). One of the items was a Remington model 1100 semiautomatic .12 gauge shotgun, in good working order.(T.612). Mr. Williams dropped the gun on different areas of it and also beat upon various parts of it in an attempt to determine whether or not it would fire.(T.612-13). He determined that the only means of firing the weapon was by pulling the trigger.(T.613). Mr. Williams then examined the two spent casings found at the scene to compare them to his test firings to see if they came from the same gun.(T.617). He originally felt that one was too rusty to make that determination, then after examining it from a different angle in greater detail was able to determine that both spent casings came from the same gun.(T.617). Williams identified wadding provided to him which came from the victim as the type used by Remington-Peters shot shells.(T.620). The shot supplied to him was consistent with number six shot.(T.619). One unspent six shot shell was found inside the gun at the scene.(T.618-19).

Medical examiner Dr. Terrence Steiner performed the autopsy of Irene Newton on January 1, 1990.(T.648). The autopsy revealed a shotgun wound to the anterior chest, moving from the right to the left.(T.660). The shot was deflected by the breastbone, breaking off half the adjacent breastbone, as well as, pieces of rib.(T.640). A physical hole was found in the heart itself.(T.651). Dr. Steiner testified that the victim did not die immediately, but lived for several minutes until so much blood seeped into the cardiac sack that the resultant build up of pressure caused the heart to stop beating.(T.650). Bullet wadding, the plastic carrier for the shell, and a number of representative pellets were recovered during the autopsy for analysis.(T.656).

The Penalty Phase

For the penalty phase of the trial, the State rested on the evidence presented during the guilt portion. The defendant's first witness, Harriet Goodwin, a corrections officer testified that the defendant's record revealed only seven misdemeanor traffic related convictions.(T.727). Mark Bennett, a corrections officer who was acquainted with the defendant since his January 18, 1990 arrest, testified that the defendant had not created any major disturbances to his knowledge during his incarceration.(T.728-9).

The defendant's sister, Estelle Snell, testified that her half-brother had a happy childhood.(T.737). She did not know how far he had gone in school as he was in and out of the home.(T.737). She stated that the defendant had never hurt anyone

and that she loved him and did not want to see him die in the electric chair.(T738).

The defendant also took the stand in his own behalf[6] .(T.730-5). He stated that he had to quit school while in the sixth grade to go to work to help support his family; he denied being able to read or write.(T.730). He claimed that at the time of the murder he was working for himself as a mason earning two hundred and fifty to three hundred dollars a week.(T.732). The defendant stated that he helped Irene pay the bills and that his lack of financial help was not the reason she put him out.(T.733). In fact, he testified that he did not know why she put him out.(T.733). The defendant admitted that he has five children from his only marriage, but did not provide them with any financial support since they moved away.(T.733-4). The defendant also claimed to be sorry for what had happened, stating that he loved Irene and did not want to die in the electric chair.(T.732).

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[6] This testimony was, however, at odds with that he gave at the hearing on his motion to suppress prior to trial.(T.271-78,311-16). Specifically, he testified at the hearing that he had no education whatsoever.(T.272).

ISSUES ON APPEAL

I.

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SUMMARY OF THE ARGUMENT

The trial court correctly denied the defendant's motions to suppress two statements made to the police since the record below establishes that both were knowingly and voluntarily made by him after his rights pursuant to Miranda were read.

The trial court did not err in denying the defendant's motion for continuance, made on the eve of trial, when the motion did not comply with the requirements of Fla.R.Crim.P. 3.190 and the defense failed to establish that despite due diligence it could not proceed to trial without prejudice to its case.

Reversible error did not result from the prosecutor's closing argument which constituted fair response to the defense's argument which sought a mercy recommendation for the defendant when the defense failed to object to the single comment made.

The trial court correctly found that the murder was heinous, atrocious, and cruel as the victim lived in helpless anticipation of her death prior to the time the defendant actually carried out his threat to kill her.

The trial court correctly found that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The defendant's own admissions substantiated this finding.

The trial court did not err in failing to find evidence presented in mitigation which was controverted on the record.

The death penalty imposed in this case is not disproportionate under the facts established below.

The trial court did not err in utilizing the standard jury instruction on the aggravating factor of heinous, atrocious, and cruel to which the defense did not object.

The trial court did not err in utilizing the standard jury instruction on the aggravating factor of cold, calculated, and premeditated to which the defense did not object.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTIONS TO SUPPRESS STATEMENTS TO THE POLICE WHICH WERE VOLUNTARILY AND KNOWINGLY MADE AFTER MIRANDA.

As his first issue on appeal, the defendant challenges the trial court's admission of two statements, made at different times, to the police regarding the crime of which he stands accused. He bases his challenge on the fact that the trial court never used the talismanic term "voluntary" in denying his motions and on his claim, which is totally unsupported by the record, that he was both mentally retarded and on pain medication at the times the statements were made. Although highly appealing when not reviewed in light of the facts presented below, the defendant's claim fades into obscurity when it is analyzed in view of the facts presented below which, of necessity, are viewed in a light most favorable to the State.

The defendant, in reliance upon McDole v. State, 283 So.2d 553 (Fla. 1973), asserts that the trial court erred in denying his motion to suppress since it "never made the unequivocal and explicit finding of voluntariness this court has required."(Defendant's brief page 10). However, as recognized in another case cited by the defendant, Antone v. State, 382 So.2d 1205 (Fla. 1980), this Court "modified the strict requirement that an express finding must appear in the record." Id. at 1212. While the Court found that ideally a trial judge should specify his conclusions regarding the voluntariness of a

confession or inculpatory statement, it held that due process is not offended where the issue is directly before the court and it determines the evidence is admissible without using the term voluntary. In receding from its prior opinion, the Court obviously recognized the question is whether or not the record clearly demonstrates the voluntariness of the confession. In this case, the record does just that. Hoffman v. State, 474 So.2d 1178, 1181 (Fla. 1985).

The defendant's version of the facts produced at the suppression hearing are both incomplete and misleading; they ignore the fact that the defendant's version was totally controverted by the testimony of other witnesses, as well as by his own statements. The record establishes that with regard to the first statement, the defendant was alert and had his faculties about him.(T.262-3). He was fully aware of why the officers were there (T.263) and he himself admitted that the tape recording of his statement was accurate.(T.271). His assertion on appeal that he did not understand his rights is ludicrous, at best. The defendant repeatedly testified that he understood what they were explaining to him.(T.276,277,278). The only thing the defendant seems not to have understood was that the investigation regarding Irene's murder would result in him facing a potential death penalty. ("I didn't know what I was going to go through."(T.271). That certainly does not rise to the level of not understanding his rights. Additionally, the statement that he felt "pretty bad now" simply does not reflect his physical condition at the time of the interview. Captain

Widner clearly testified that he took the statement to mean that, in reflection, the defendant felt badly about having murdered Irene.(T.269). It is also impossible to accept the defendant's claim that he was on medication for pain since there is no record support for that claim; he could not identify any pills he took as pain medication.(T.274). The nursing staff obviously felt no compunction in allowing the officers to conduct the interview at that time.(T.261). The fact he was potentially on medication also would not prevent him from making a voluntary confession in any event. This assertion is also belied by the defendant's testimony that he had been having a several hour visit with a family member with whom he had been conversing prior to the officers' arrival.(T.262,274).

With regard to the second statement to Sgt. Davis, the facts supporting the trial court's ruling are also clear upon the face of the record. Sgt. Davis testified that he did everything possible to convince the defendant not to talk about the case and that only after he persisted in doing so did he Mirandize the defendant and discuss the case.(T.304). The defendant's claim on appeal that he told Davis that he didn't know anything more than Irene got shot is totally refuted by Sgt. Davis' testimony which presents a complete accounting by the defendant.(T.291-304). The defendant's version that he lay down the whole way back to Jackson County is also rebutted by the officer's testimony. Sgt. Davis testified that the defendant sat in the right rear passenger seat, in handcuffs, during the return four mile trip and did not complain of discomfort or

pain.(T.291,300). It is obvious that the trial court, which was in the best position to evaluate the facts and the credibility of the witnesses before it, found the officers' testimony credible, not the defendant's. This finding is entitled to a presumption of correctness in this Court. Stone v. State, 378 So.2d 765 (Fla. 1979), cert. denied, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980); Palmes v. State, 397 So.2d 648 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981).

The defendant also claims that he could not have made a voluntary confession under the circumstances due to his mental retardation. However, the record fails to support his claim of mental retardation with the exception of one medical report by a defense expert that the defendant "appears" to be mildly mentally retarded. This report, which interestingly enough shows it was not placed before the court until October 15, 1990, i.e. the day of sentencing, does not find that the defendant was either incompetent of unable to understand the nature and significance of the charges against him. It is inconclusive, at best, and does not find that the defendant is, in fact, retarded, nor does it set forth a basis for the doctor's comment. It is apparent that even trial counsel did not believe the defendant's mental state or lack thereof to be at issue.

Finally, the defendant's reliance upon DeConingh v. State, 433 So.2d 501 (Fla. 1983) for the proposition that he was unable to make a voluntary statement since he claims to have been on mind altering medication is totally misplaced. The facts

of that case are totally distinguishable from the instant case since in DeConingh,: 1) the defendant was not informed of her rights and the officer made no attempt to ascertain if she understood them, 2) witnesses described DeConingh as hysterical, confused, disoriented, and under the influence of specific drugs (valium and thorazine), and 3) the officer took advantage of his relationship to DeConingh to obtain the confession. In direct contrast, none of the factors presented in DeConingh are found here.

Based upon the foregoing, it is clear that the trial court did not err in denying the motions to suppress, but instead acted within its authority. See also: Burns v. State, 16 F.L.W. D2054 (Fla. 4th DCA August 7, 1991).

II.
THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR CONTINUANCE MADE IMMEDIATELY PRIOR TO TRIAL WHEN THE DEFENDANT FAILED TO ESTABLISH PREJUDICE BY BEING REQUIRED TO PROCEED TO TRIAL.

The defendant contends that the trial court erred in denying his motion for continuance made on September 21, 1990, four days before trial was scheduled to begin, since he alleges he was prejudiced thereby. The record, however, reveals that the motion not only failed to comport with the requirements of the rules of criminal procedure of this Court, it also establishes that the defense failed to proffer the nonspeculative nature of the prospective evidence to be obtained and also failed to establish how he would be prejudiced.

The transcript of the hearing conducted on the Twenty-first shows that for the first time since the crime was committed, the defense sought appointment of a firearms expert although it admits knowing that the defendant's firearm and other items had been in the F.D.L.E. examiner's possession since January 1, 1990.(T.327). The defense also knew the identity of the firearms examiner in charge of the case through discovery supplied by the State; although the defense spoke with Mr. Williams by phone regarding his proposed testimony, it did not depose him despite the fact that no written report had been generated by Williams prior to the day of the hearing.(T.328).

The defense did not submit a written motion for continuance to the court, nor did it either orally or in writing provide a certificate of good faith in compliance with Fla.R.Crim.P. 3.190. The defense's only grounds for requesting the continuance were that counsel felt it unfair to have to prepare over the weekend and added "[i]t might be worthwhile to have an expert double check the work the F.D.L.E. man has done also."(T.328). The sole change in the expert's testimony was that through additional testing, Williams had been able to verify that a second shell came from the defendant's shotgun when on initial review he had not been able to make that determination with certainty.(T.329-30). Defense counsel conceded the absence of prejudice to the case, saying that all four eyewitnesses to the murder said that the only gun present was the one brought by the defendant.(T.331). He did, however, assert that the next door neighbor had a shotgun.(T.331). No

testimony at any part of the proceedings, either before or during trial, was presented in support of that theory.

The defendant admits the trial court is vested with broad discretion in the granting of a motion for continuance. Echols v. State, 484 So.2d 568 (Fla. 1985), cert. denied, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1985). This principle remains intact even in death penalty cases. Williams v. State, 438 So.2d 781 (Fla. 1983), cert. denied, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 146 (1984). In this case, it is clear that the court did not abuse its discretion in denying the motion.

As previously stated, the defendant's motion failed to meet the requirements of Fla.R.Crim.P. 3.190 as it was not accompanied by a certificate of good faith. Williams v. State, supra. Additionally, the oral motion failed to set forth valid reasons to justify a continuance. Defense counsel's belief that he should not have to work over the weekend and his thought that someone should go over Mr. Williams' work are not meritorious. The motion does not establish that despite due diligence the defense could not go forward without prejudice to its case. There is no specific amount of time which establishes, as a matter of law, lack of preparedness on the part of defense counsel. Cox v. State, 354 So.2d 957 (Fla. 3d DCA 1978), cert. denied, 359 So.2d 1212 (Fla. 1978). Additionally, the motion did not state what evidence a defense expert would have testified to or that any proof favorable to the defendant would result and was therefore merely speculative in nature[7] . Lyles v. State,

[7] The defendant apparently does not challenge the trial court's

312 So.2d 495 (Fla. 1st DCA 1975); U.S. v. Bergouignan, 764 F.2d 1503 (11th Cir. 1985), appeal after rem., 821 F.2d 1495, reh. denied, 828 F.2d 775, cert. denied, 484 U.S. 1044, 108 S.Ct. 778, 98 L.Ed.2d 864 (1988). Finally, the defense failed to establish prejudice, conceding that all the eyewitnesses to the crime stated that the only gun present at the scene was that of the defendant and they saw him shot the victim. Thus, the testimony the defendant sought to obtain could not materially affect the outcome of the case. Kitchen v. State, 89 So.2d 667 (Fla. 1956). The defendant therefore may not prevail on this issue.

III.
REVERSIBLE ERROR DID NOT RESULT FROM THE STATE'S CLOSING ARGUMENT, WHICH CONSTITUTED FAIR RESPONSE, WHEN IT WAS NOT OBJECTED TO BY THE DEFENSE.

The defendant contends that the trial court erred in allowing the prosecutor in closing argument to argue that the jury should show the defendant the same mercy he showed the victim. However, this argument ignores several key factors which prevent him from prevailing on appeal.

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failure to appoint an expert as he abandons that argument in his brief. Nevertheless, the same argument applies. In Espinosa v. State, 16 F.L.W. S489, S491 (Fla. July 11, 1991), this Court recognized that to justify the appointment of an expert "a defendant must demonstrate something more than a mere possibility of assistance from a requested expert..."

The defendant relies upon a series of cases, not comparable to this one, for the proposition that this Court has reversed in cases where a prosecutor has made impassioned final argument to a jury that so inflamed them that the defendant was prevented from receiving a fair trial. While the State does not dispute the correctness of this Court's findings in those cases, it is clear that the circumstances here are not only procedurally distinguishable, the comment did not rise to the level necessary to require reversal.

For example, in Rhodes v. State, 547 So.2d 1201 (Fla. 1989), a case which the defendant claims is directly on point, a prosecutor in closing argument asked jurors to place themselves in the hotel where the murder took place, stressed that the victim's body had been transported from the hotel in a dump truck, suggested that the defendant might be paroled before he served a twenty-five minimum mandatory term, claimed that the defendant acted like a vampire in committing the crime, and appealed to the jury to show the defendant the same mercy he showed the victim. This Court held that the cumulative effect of all of the comments, all of which were objected to and overruled, constituted an unnecessary appeal to the sympathy of the jury calculated to influence their sentence recommendation. Rhodes is thus not comparable to the instant case since absolutely no objection was made to the complained of comment to preserve it for the appellate review of this Court, Hoffman v. State, 474 So.2d 1178 (Fla. 1985), and the one comment complained of simply does not rise to the level requiring

reversal set forth in Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). This Court cannot say that the comment, made during the guilt phase, affected the outcome of the jury's findings of guilt since defense counsel conceded the fact that the defendant shot and killed Irene and eyewitnesses to the crime and preceding events testified that the defendant had previously threatened to kill the victim and then returned to carry out his threat.

Additionally, the prosecutor's closing argument was made in direct response to defense counsel's argument which, without using the specific word "mercy," asked the jury to employ that emotion by finding the defendant guilty of a lessor included offense. The defense sought to have the jury find the defendant guilty of second degree murder claiming that he had no intention to commit premeditated murder by attempting to paint a picture of a distraught man who impulsively lost his head when he was unfairly put out of the house by a drunk former girlfriend all dressed up to go out without him.(T.672-6). The prosecutor's argument was designed to rebut this version of the facts and, when read in its entirety, establishes the prosecutor sought to show the defense was seeking to improperly evoke their sympathy for someone who in reality had threatened to kill Irene prior to the night in question and then returned armed and fully prepared to carry out his threat. The prosecutor's argument was fair or invited response that does not warrant reversal. See: Dufour v. State, 495 So.2d 154 (Fla. 1986), cert. denied, 107 S.Ct. 1332,

94 L.Ed.2d 183 (1985); Williams v. State, 511 So.2d 289 (Fla. 1987).

IV.
THE TRIAL COURT DID NOT ERR IN FINDING THAT THE DEFENDANT'S MURDER OF IRENE NEWTON WAS HEINOUS, ATROCIOUS, AND CRUEL.

The defendant asserts that the trial court erred in finding that the murder committed by him was heinous, atrocious, and cruel. In support of that claim he states that since the murder was committed by a single gunshot blast to the chest with death following shortly thereafter this case is similar to Teffeteller, supra, and the aggravating factor is not applicable. This case, however, differs from those relied upon by the defendant for a significant reason. In Teffeteller, for example, that defendant pulled up to an hitherto unknown individual and fired one shotgun blast to the chest. In direct contrast, in this case, the defendant had previously terrified the Newton family by breaking into their home and had repeatedly threatened to kill his victim prior to actually doing so. The defendant's argument totally overlooks the fear and knowledge of these threats which must have consumed the victim both before his return the night of the murder and upon his knocking on the door. It is apparent from the testimony of the eyewitnesses that the Newtons feared the defendant's return to their home as illustrated by their fear from the prior break in, their

reluctance to allow him to enter and their attempt to keep him from reentering, and the fact that several of the children, including one who armed herself with a kitchen knife to protect her mother, followed Irene outside after the defendant had forced open the door. The cases relied upon by the defendant are thus distinguishable since the victims in those cases had no forewarning of their killers' intention toward them and had no fear of impending death prior to the shot. See and compare: Amoros v. State, 531 So.2d 1256 (Fla. 1988) (HAC not applicable where record reflected defendant did not know victim and shot victim within two minutes of entering premises with intention of shooting former girlfriend). This Court has, however, upheld the finding of HAC where a victim suffers mental anguish as a result of a defendant's actions which cause them to anticipate their own death. Swafford v. State, 533 So.2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989), habeas corpus denied, 569 So.2d 1264 (Fla. 1990). Here, the defendant stalked the victim for days, coming to her home and harassing her, breaking in and standing over her, and threatening to kill her. The defendant's conduct in this case is thus even more egregious than that set forth in Mills v. State, 462 So.2d 1075 (Fla. 1985), cert. denied, 473 U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985) in which the Court upheld the finding of HAC due to the mental anguish a victim suffered by being stalked for a short period of time immediately prior to his death since here, Irene had days in which to anguish over the defendant's threats. See also: Phillips v. State, 476 So.2d

194 (Fla. 1985). The mental anguish suffered by Irene Newton is much like that suffered by women who undergo what is universally recognized, in both legal and scientific circles, as battered wife syndrome since she was aware of what the defendant would do to her and was powerless to protect herself. The sole distinguishing factor is that Irene's death resulted before she could bring about the defendant's death. In Ohio v. Koss, 49 Ohio St.3d. 213, 217 (1980) the court found that "the basis for the woman's perception of being in imminent danger of severe bodily harm or death at the hands of her partner" was the element utilized in determining the state of mind of the defendant [the battered wife who kills the battering spouse]. Irene obviously, as a result of the defendant's prior actions, had such an imminent fear of death. The Battered Woman Syndrome, Lenore E. Walker, Springer Publishing Company. This Court must thus recognize this ongoing fear prior to the time the threat was carried to fruition as more than sufficient to supply a basis for the trial court's finding that the murder was heinous, atrocious, and cruel.

V.

THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE DEFENDANT'S MURDER OF IRENE NEWTON WAS COLD, CALCULATED, AND PREMEDITATED WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION.

The defendant contends that the trial court erred in finding that the murder of Irene Newton was cold, calculated,

and premeditated without pretense of legal or moral justification (CCP) since it "took a very selective reading of the evidence produced at trial to support its finding" and because the evidence showed "a mentally retarded defendant acting upon a poorly thought-out plan of how to win back what he had lost." (Defendant's brief page 31). This argument not only ignores the facts as determined by the trier of fact, it also seeks to urge a point of view not employed by the defense during the penalty phase.

The defense graciously concedes that the facts set forth by the trial court may show some premeditation, but then goes on to argue that other evidence raises a reasonable doubt as to whether a plan had been formulated by the defendant. It is beyond belief to assume that an individual who threatens to kill someone and who admits returning to that individual fully armed with the intention to lure her outside where he can use the weapon is there to woo the object of his affections back into his life. Flowers and candy would be far more appropriate not to mention effective.

The defendant attempts to argue his mental retardation as proof of his inability to formulate a plan. The State would respectfully point out, once again, that this was not argued to the court or to the jury. Instead, it was presented to the court after the presentation of penalty phase evidence was completed immediately prior to sentencing. Clearly, the trial court, who was in the best position to assess the defendant did not find him to be mentally retarded or did not find any slight

impairment he may have had to be of any influence in his actions so as to rise to the level necessary to constitute mitigation. Doyle v. State, 460 So.2d 353 (Fla. 1984); Lara v. State, 464 So.2d 1173 (Fla. 1985). The defendant, in conjunction with his claim of mental retardation, argues that his lack of education also prevented him from being able to formulate a careful, prearranged plan to effectuate Irene's death. The record refutes the fact that because of his lack of formal education he was unable to succeed in life and work independently since the defendant's own testimony at various stages of the proceedings was that he made between three and four hundred and fifty dollars a week. Again, the trial court observed the defendant and did not feel that his lack of formal schooling was a factor that would prevent him from devising a plan. To the contrary, the record clearly reflects that the court found that the defendant had such a plan since, by his own admission, he procured and concealed a weapon before arriving at the trailer, he planned to and did lure Irene outside, and then shot her in the chest. The defendant's argument that he had no plan as he did not try to prevent Irene from receiving help is absurd. The medical examiner testified that even if immediate help was available, she would not have survived given the nature of the wound. The fact that she did not call for help is also of no avail since she could not see the weapon until she reached the tongue of the trailer; similarly the fact that she could have called for help does not change anything since what help could her children and sister be when faced with a loaded shotgun. The

defendant's argument as to both points is insulting at best to individuals who are either deprived of a formal education or who are mentally retarded, since they have historically despite their "disabilities" contributed to society.

Finally, the facts rebut the defendant's claim he acted as a result of a deficient mind running out of control. The defendant's own testimony established that this was not a crime of passion committed on impulse. He came to the trailer armed to kill and when Irene told him to go, he pulled out a shotgun from where he had hidden it and killed her. The trial court correctly found that CCP applied in this case. Jackson v. State, 498 So.2d 406 (Fla. 1986), cert. denied, 483 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 740 (1987), reh. denied, 483 U.S. 1041, 108 S.Ct. 11, 97 L.Ed.2d 801 (1987).

VI.
THE TRIAL COURT DID NOT ERR IN FAILING TO FIND EVIDENCE PRESENTED IN MITIGATION WHICH WAS CONTROVERTED BY THE RECORD.

The contends that pursuant to the dictates of Campbell v. State, 571 So.2d 415 (Fla. 1990), the trial court was obligated to find mitigating evidence in the form of his mental retardation and alcohol and drug use and thus committed reversible error by failing to do so. Campbell does not stand for the proposition that the trial court is obligated to find mitigating evidence so long as any basis, no matter how meager, appears in the record. Instead, it holds that a trial court need

only find as a mitigating factor each proposed factor which is mitigating in nature and which has been reasonably established by the weight of the evidence. "This is a question of fact and one court's finding will be presumed correct and upheld on review if supported by "sufficient" competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). It is therefore clear that before a trial court is obligated to find evidence in mitigation it must be supported by sufficient and competent evidence in the record. Here, as established below, the matters the defendant argues in mitigation were controverted by the record and the trial court acted within its discretion in rejecting them.

The defendant once again argues his mental retardation or learning disability compelled the court to find this an element in mitigation. The State readopts its argument set forth in the previous issue as to CCP with regard to the defendant's alleged mental retardation as though set forth in its entirety. Additionally, absolutely no evidence whatsoever was presented as to any learning disability suffered by the defendant. It would also point out that Campbell did not become final until the time that rehearing was denied on December 13, 1990 and nothing in that opinion mandates retroactive application of the principles established by it even if it did apply to this case.

The defendant's case in support of his claimed alcoholic and drug abuse at the time of the crime is equally weak. The only support the defendant cites to in his brief is the fact that Dr. Walker stated in his evaluation that he was "almost

certainly" under the influence at the time. However, not only does Walker fail to set forth what facts substantiate this statement, it is clear that the doctor was not himself convinced of the defendant's drug and alcohol abuse. Even more significant is the fact that the record is devoid of any evidence to support the defendant's claim he was on drugs either at the time of the offense or on a regular basis. The defendant's own testimony during the case was that Irene and her family had been drinking the night of the murder, but that he had not.

Record support for the defendant's claim that he had an abused childhood is also absent. The sole reference to his childhood was that he quit school early to help support his family. While this is unfortunate, it certainly does not rise to the level of an abused childhood. In fact, the defendant's sister, Estelle Snell, testified during the penalty phase that the defendant had a happy childhood. She did not mention an abused childhood, substance abuse, or mental deficiencies in any manner whatsoever, matters of which, as a close relative, she would have had personal knowledge had they been present. As a result, the argument with regard to this issue must fail.

VII.
THE TRIAL COURT DID NOT ERR IN SENTENCING THE DEFENDANT TO DEATH.

The defendant contends that the trial court erred in sentencing him to death alleging that the sentence imposed is

disproportionate to that for other similar crimes. He bases this assertion on the fact that he crime was "domestic" in nature. Contrary to the defendant's position, however, this court has, in other instances, upheld imposition of the death penalty in murders where the parties had some sort of domestic relationship. Porter v. State, 564 So.2d 1060 (Fla. 1990) (Imposition of the death sentence for the killing of an ex-lover and her boyfriend found not to be disproportionate).

In this case, unlike those cited to by the defendant, the record is devoid of any reference to ongoing domestic problems between the defendant and Irene. The defendant's own testimony revealed that they had a number of good years together before the relationship ended and the defendant stated that they had not been fighting. This case is also distinguished from those cited to by the defendant since the record is equally devoid of any evidence that he was operating under the influence of drugs or alcohol at the time of the crime. As previously stated, the conjectures of a defense psychiatric expert which are purely speculative in nature and which are rebutted by the defendant's own testimony simply do not provide support for this fact. Other claimed elements of mitigation are also easily disposed of; the State would respectfully rely on the argument relating thereto in prior issues. The State will however, address the defendant's claim that he was acting and looking "crazy" at the time of the murder. The record establishes that the children described the defendant as "angry" and "mean", not simply crazy. The addition of these terms certainly changes the impact of the defendant's

argument. The testimony of the children who made the statements must also naturally be viewed in light of the circumstances. Anyone who brandishes a knife and arrives armed with a weapon, which is pointed indiscriminately at innocent people, is going to appear crazy to someone who does not see fit to behave in such a manner. Furthermore, nothing in the record would justify the defendant's interpretation of the testimony as a clinical diagnosis of the defendant's mental condition, since nothing establishes the children's competence to make such a diagnosis. Thus, it is clear, that the choice of this term was a result of the leading questions of defense counsel and was also an attempt to categorize a behavior that was alien to them. To murder someone is not normal behavior to most people.

The State would also rebut the defendant's contention that he did not brood for a long time about killing Irene. It is inconceivable that the defendant carried a weapon for miles on foot, taking pains to conceal it, but did not intend to use it. To the contrary, he admitted to the police that he left the gun by the trailer where it could not be by someone leaving the trailer and also admitted that he lured Irene outside under the pretext of talking to her. The evidence must be viewed in the State's favor with all reasonable inferences resolved against the defendant. The facts do not support the defendant's version of what occurred. His desire to commit suicide is also rebutted by his own testimony in which he denied trying to do himself in. His actions must also be analyzed in light of the possibility that he did not want to face possible punishment, a fact

substantiated by his repeated statements to the effect that he did not know, or more likely did not want to face, possible punishment for his actions.

The defendant's position also ignores the fact that the jury, by an overwhelming recommendation, voted in favor of the death penalty. The jury was obviously in the best position to view the facts in evidence, evaluate the credibility of witnesses, and weigh both the aggravating and mitigating factors presented. As this Court has recognized in countless cases, many of them dealing with jury overrides, the jury's recommendation is entitled to the greatest of weight and deference. Tedder v. State, 322 So.2d 908 (Fla. 1975). The rationale applied to those cases is therefore equally applicable here. The trial court, after conducting its own independent evaluation as required by law, found no rational reason to disagree with the jury's recommended verdict. For all of these reasons, the trial court correctly imposed the death penalty.

VIII.
THE TRIAL COURT DID NOT REVERSIBLY ERR IN ITS JURY INSTRUCTION ON THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS, AND CRUEL TO WHICH THE DEFENSE DID NOT OBJECT.

The defendant contends that the trial court erred in its jury instruction regarding the aggravating factor of heinous, atrocious and cruel which he claims was inadequate, although he concedes that it was the standard form instruction. This issue has been repeatedly raised by defendants in this Court and has been soundly rejected.

In the first instance, the defendant contends that the jury instruction on the aggravating factor of "HAC" is unconstitutionally vague, citing to Maynard v. Cartwright, 484 U.S. _____, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) and its progeny. Maynard, however, has no applicability to Florida's sentencing scheme. The defendant's argument, in its entirety, has been considered and rejected by this Court. Smalley v. State, 546 So.2d 720 (Fla. 1989); Dixon v. State, 283 So.2d 1 (Fla. 1973); Hildwin v. Florida, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), reh. denied, 109 S.Ct. 3268, 1106 L.Ed.2d 612 (1989). The defendant's argument fails for this reason alone. Additionally, as no objection to the standard instruction was made at trial and no request for additional instruction was made, the matter is not preserved for the appellate review of this court. Vaught v. State, 410 So.2d 147 (Fla. 1982); also see: Bottoson v. State, 433 So.2d 962 (Fla. 1983), cert. denied, 469 U.S. 873, 105 S.Ct. 223, 83 L.Ed.2d 147 (1984).

IX.
THE TRIAL COURT DID NOT REVERSIBLY ERR IN ITS JURY INSTRUCTION OF THE AGGRAVATING FACTOR OF COLD, CALCULATING, AND PREMEDITATED TO WHICH THE DEFENSE DID NOT OBJECT.

The defendant contends that the trial court erred in reading the standard jury instruction on the aggravating factor of cold, calculated, and premeditated without providing further limiting instructions. However, as the defendant concedes, the instruction read was the standard instruction approved by this

Court. His argument has, as in the instance above, been previously raised by other defendants and has been rejected by this Court which has held that the standard instructions are appropriate. Vaught v. State, supra; Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985). He may not prevail for this reason. Also, as the defense failed to either object to the instruction as read or to request different or additional instruction, the matter is barred for appellate review. Vaught v. State, supra; Bottoson v. State, supra.

CONCLUSION

Based upon the argument contained herein, the Appellee, the **STATE OF FLORIDA**, respectfully requests that this Honorable Court affirm the conviction and sentence imposed below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 Monroe Street, Tallahassee, Florida 32301 on this 25th day of September 1991.

Giselle D. Lyle

GISELLE D. LYLEN
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